

1 The grievance was processed through the grievance procedure and
2 NNRH denied the grievance on January 18, 2016. The following day, on
3 January 19, 2016, Local 1107 demanded arbitration as required under
4 Step 4 of the grievance procedure. On January 26, 2016, a Local 1107
5 representative began preparing a request to the Federal Mediation and
6 Conciliation Service ("FMCS") for the panel of arbitrators, but was
7 unable to complete the request that day due to difficulty with the
8 payment processing. The request for the panel of arbitrators was
9 submitted on January 27, 2016. NNRH subsequently refused to arbitrate
10 the Dittrich grievance because the request to the FMCS was not
11 processed timely.

12 On June 13, 2016, Local 1107 filed a complaint in the Fourth
13 Judicial District Court, Elko County, Nevada, for declaratory relief
14 and an order compelling arbitration of the Dittrich dispute. The
15 complaint requests that the court enter a declaratory judgment that
16 Local 1107 met the time limit requirement in the CBA when it
17 "presented" or "appealed" the grievance in notifying NNRH of its
18 intent to proceed to arbitration and that its FMCS request is not
19 "presenting" or "appealing" a grievance. Alternatively, the complaint
20 requests the court enter a declaratory judgement that Local 1107
21 substantially complied with the time requirements when it attempted
22 to submit its FMCS request on January 26, 2016. The case was removed
23 on August 10, 2016, pursuant to federal question jurisdiction.

24 **II. Standard**

25 In considering a motion to dismiss for failure to state a claim
26 under Fed.R.Civ.P. 12(b)(6), the court must accept as true all
27 material allegations in the complaint as well as all reasonable
28 inferences that may be drawn from such allegations. *LSO, Ltd. v.*

1 *Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the
2 complaint also must be construed in the light most favorable to the
3 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir.
4 2000). The purpose of a motion to dismiss under Rule 12(b)(6) is to
5 test the legal sufficiency of the complaint. *Navarro v. Block*, 250
6 F.3d 729, 732 (9th Cir. 2001). The court can grant the motion only
7 if it is certain that the plaintiff will not be entitled to relief
8 under any set of facts that could be proven under the allegations of
9 the complaint. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th
10 Cir. 1996).

11 "[A] court may consider evidence on which a complaint necessarily
12 relies if: (1) the complaint refers to the document; (2) the document
13 is central to the plaintiff's claim; and (3) no party questions the
14 authenticity of the copy attached to the . . . motion." *Daniels-Hall*
15 *v. Nat'l Educ. Ass'n.*, 629 F.3d 992, 998 (9th Cir. 2010).

16 **III. Argument**

17 NNRH does not dispute that the Dittrich termination grievance
18 arises under the terms of the CBA. Rather, NNRH argues that Local
19 1107 does not have the right to arbitrate the grievance because the
20 union failed to process the grievance within the requisite time limits
21 established in the CBA. NNRH recognizes that procedural issues are
22 presumptively for the arbitrator to decide. It argues, however, that
23 Article 11.8 removes the question from the arbitration panel's
24 jurisdiction. Article 11.8 provides:

25 Any grievance not presented or appealed within the time
26 limits and in the manner provided in Section 2 hereof
27 shall be deemed to have been settled or abandoned, is
28 expressly excluded from arbitration, and shall not be
presented to any arbitrator.

NRH contends that on the basis of this provision the court is

1 required to consider the timeliness of the Local 1107's request
2 arbitration. NNRH argues that Local 1107 failed to comply with the
3 time limits set forth in Step 4 of the grievance procedure. Step 4
4 addresses the procedure for advancing a grievance to arbitration:

5 If the grievance is not resolved at Step 3, the grievance
6 may be referred to arbitration upon written request by
7 the Union, which request must be made in writing to the
8 Employer within fourteen (14) calendar days after receipt
9 of the Employer's Step 3 answer. In the event
10 arbitration is requested, the Union will, within seven
11 (7) calendar days after notice to the Hospital, submit to
12 the Federal Mediation and Conciliation Service (FMCS) a
13 completed form R-43 with a copy to the Employer,
14 requesting that the Service furnish both parties with a
15 panel of eleven (11) arbitrators having hospital
16 arbitration experience.

17 Article 11.2.

18 Local 1107 had seven calendar days, until January 26, 2016, to
19 submit to FMCS a completed form R-43 with a copy to NNRH. Because
20 Local 1107 did not complete the form until January 27, 2016, NNRH
21 argues that the grievance was "not presented or appealed within the
22 time limits" provided in Article 11.2. Thus, NNRH argues that Local
23 1107 is not entitled to the relief it is seeking, an order requiring
24 NNRH to arbitrate the grievance, and moves to dismiss the complaint
25 pursuant to Federal Rule of Civil Procedure 12(b)(6).

26 "'Procedural questions which grow out of the dispute and bear on
27 its final disposition' are presumptively not for the judge, but for
28 an arbitrator to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537
U.S. 79, 84 (2002) (citing *John Wiley & Sons, Inc. v. Livingston*, 376
U.S. 543, 557 (1964)). Whether Local 1107 complied with the grievance
procedures set forth in the CBA is an issue of procedural
arbitrability to be decided by the arbitrator, not by the court. *John
Wiley & Sons*, 376 U.S. at 556 n. 11 (issue of timeliness is to be

1 decided by the arbitrator notwithstanding the provision stating "[t]he
2 failure by either party to file the grievance within the [4-week] time
3 limitation shall be construed and be deemed to be an abandonment of
4 the grievance"); *United Food & Commercial Workers Union, Local 770 v.*
5 *Geldin Meat Co.*, 13 F.3d 1365, 1368 (9th Cir. 1994) (quoting *United*
6 *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582
7 (1960) ("[J]udicial inquiry . . . must be strictly confined to the
8 question whether the reluctant party did agree to arbitrate.");
9 *Hospital & Institutional Workers Union Local 250 v. Marshal Hale*
10 *Memorial Hospital*, 647 F.2d 38, 40 (9th Cir. 1981) (holding that the
11 contract interpretation necessary to resolve procedural questions is
12 properly left to the arbitrator).

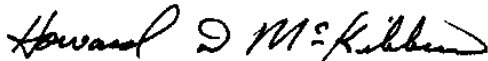
13 *Hospital & Institutional Workers Union Local 250 v. Marshal Hale*
14 *Memorial Hospital*, 647 F.2d 38, 40 (9th Cir. 1981) is instructive as
15 the hospital in that case argued that "the Union is foreclosed from
16 demanding arbitration by its failure to comply with the contractual
17 grievance procedure." In that case, the agreement provided that "[n]o
18 grievance shall be presented to arbitration unless the demand for
19 arbitration is presented by a party in writing to the other party
20 within thirty (30) calendar days of the other party's final written
21 response in Step 2 of the grievance procedure." *Id.* at 41. The Ninth
22 Circuit held the issue of the alleged non-compliance with processing
23 the claim under the agreement were procedural questions, and that
24 "[t]he contract interpretation necessary to resolve these questions
25 is properly left to the arbitrator." *Id.* at 41. Article 11.8 of the
26 CBA, like the provisions cited in *Hospital & Institutional Workers*
27 *Union Local 250*, does not overcome the presumption that procedural
28 issues are for the arbitrator to decide because "it does not provide

1 explicit language demonstrating that the parties to the collective
2 bargaining agreement did not intend the arbitration panel to have
3 authority to decide issues of timeliness." *Goss Golden W. Sheet*
4 *Metal,, Inc. v. Sheet Metal Workers Int'l Union, Local 104*, 933 F.2d
5 759, 764 (9th Cir. 1991).

6 Local 1107 stated a claim for which relief may be granted, namely
7 that the court should compel arbitration under the CBA based on NNRH's
8 alleged violations of the agreement. Accordingly, defendant's motion
9 to dismiss (ECF No. 6) is **DENIED**.

10 IT IS SO ORDERED.

11 DATED: This 5th day of January, 2017.

12 
13

14 UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28